Filed 3/29/19 In re S.S. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re S.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. S.S., Defendant and Appellant.	A153293 (Sonoma County Super. Ct. No. J-38897)

Appellant, a minor, pled no contest to an allegation contained in a wardship petition that she committed a violation of Penal Code section 206, torture. The court committed appellant to the Division of Juvenile Justice (DJJ) and set a seven-year maximum period of confinement. On appeal, appellant contends the court erred in finding sufficient evidence she had the requisite intent to torture the victim. She further contends the court abused its discretion by committing her to the DJJ instead of a less restrictive placement and in setting her maximum custody time. Finally, appellant argues the court erroneously imposed probation conditions. We agree the probation conditions should be stricken, but otherwise affirm the judgment.

I. BACKGROUND

In 2017, the Sonoma County District Attorney filed a petition under Welfare and Institutions Code section 602, subdivision (a), alleging appellant committed torture (Pen. Code, § 206; count 1) and assault by means likely to produce great bodily injury (*id.*,

§ 245, subd. (a)(4); count 2), with a great bodily injury enhancement as to count 2 (*id.*, § 12022.7, subd. (a)).

The probation officer's report indicates the allegations in the petition are based on an assault perpetrated by appellant and another juvenile. The victim identified her assailants, and police recovered video recordings of the assault. During the assault, the victim was punched and kicked numerous times, lost control of her bladder and bowel functions, and was forced to lick blood off one of her assailant's shoes. The victim suffered a broken nose and skull fracture from the assault.

Appellant pled no contest to count 1, and count 2 and the enhancement were dismissed. The record indicates the court explained the allegations to appellant, she was advised of her rights and the consequences of her admission, and she knowingly and intelligently waived such rights. Following an initial dispositional hearing, the court continued the matter and sought additional input from probation regarding the appropriate placement for appellant. The juvenile court subsequently committed appellant to the DJJ. Appellant timely appealed.

II. DISCUSSION

Appellant argues she lacked the requisite intent to torture the victim, the court abused its discretion in committing her to the DJJ for seven years, and the court erroneously imposed probation conditions. We address each argument in turn**.**

A. *Sufficiency of Evidence for Torture Conviction*

Appellant contends she lacked the requisite specific intent to torture the victim. Specifically, she maintains there was no evidence demonstrating an intent to inflict extreme or severe pain for the purpose of revenge, extortion, persuasion, or for any sadistic purpose—particularly in light of her status as a minor at the time of the incident—and her conduct did not fall within the range of actions constituting torture.

Appellant's arguments are foreclosed by her admission of the torture allegation. A minor's no contest plea to a crime punishable as a felony has the same legal effect as an admission or guilty plea. (*Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 791–792; *In re Troy Z.* (1992) 3 Cal.4th 1170, 1181 ["A plea of 'no contest' or an 'admission'

[citation] is the juvenile court equivalent of a plea of 'nolo contendere' or 'guilty' in criminal courts."]; see also Pen. Code, § 1016, subd. 3.) "As a general matter, when a minor enters an admission as part of a negotiated plea agreement and does not later seek to withdraw that plea, the minor has forfeited the right to attack the terms of the bargain on appeal, including any challenge to the sufficiency of the evidence." (*In re M.V.* (2014) 225 Cal.App.4th 1495, 1519.) A guilty plea "admits every element of the crime charged." (*People v. Thomas* (1986) 41 Cal.3d 837, 844, fn. 6.) By pleading guilty, a defendant has admitted the sufficiency of the evidence and cannot later question it on appeal. (*People v. Stanworth* (1974) 11 Cal.3d 588, 604–605, disapproved on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 237; *Ricki J.*, at p. 792 [guilty plea "constitutes an admission of every element of the offense charged . . . and concedes the prosecution possesses admissible evidence sufficient to prove guilt beyond a reasonable doubt"].) The only issues that survive a guilty plea are constitutional, jurisdictional, or other grounds involving the legality of the criminal proceedings. (*People v. Moore* (2003) 105 Cal.App.4th 94, 99; *In re M.V.*, at p. 1519.)

While appellant concedes in her supplemental brief[1] a no contest plea constitutes an admission to the sufficiency of the evidence of the charged offense, she asserts, however, that some Courts of Appeal have still addressed whether there was a factual basis for a guilty plea. Courts have disagreed as to whether such an argument is "fundamentally equivalent" to an attack on the sufficiency of the evidence and barred on appeal (see *People v. Voit* (2011) 200 Cal.App.4th 1353, 1365–1366, 1368 [appellant estopped from challenging the factual basis of guilty plea]) or constitutes a procedural safeguard—i.e., a challenge to the legality of the criminal proceedings—that may be raised on appeal (see *People v. Marlin* (2004) 124 Cal.App.4th 559, 571–572). Even assuming appellant's argument is interpreted as a challenge to a procedural safeguard that

[1] On January 30, 2019, this court ordered the parties to submit supplemental briefs addressing whether appellant's entrance of a no contest plea to the violation of Penal Code section 206 constitutes an admission of the sufficiency of the evidence for that violation and, if so, whether she can challenge that admission on appeal.

may be raised on appeal, she failed to do so. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218–1219 [argument waived when not raised in opening brief].) Neither her opening nor reply brief argues the trial court failed to find a factual basis for accepting her no contest plea. Moreover, the argument lacks merit. "The trial court need not obtain an element-by-element factual basis but need only obtain a prima facie factual basis for the plea." (*Marlin,* at p. 572.) Here, counsel for appellant specifically stipulated to a factual basis for the plea based on the police reports. Appellant also admitted the torture allegation, including that she assaulted the victim "with the intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, or persuasion, and for a sadistic purpose." Finally, the court at disposition expressly stated the videotapes of the assault depicted torture. Accordingly, the court did not abuse its discretion in finding a factual basis for the plea. (*People v. Holmes* (2004) 32 Cal.4th 432, 442–443 [juvenile court's finding that there is a factual basis for a plea is reviewable for abuse of discretion].)[2]

Appellant did not seek to withdraw her no contest plea. Nor has she demonstrated her plea was not knowingly, voluntarily, or intelligently made, included a legal impossibility, or otherwise should be excused. Accordingly, appellant's challenge to the sufficiency of the evidence is not cognizable on appeal.

B. *Commitment to the Division of Juvenile Justice*

Appellant contends the juvenile court erred in deciding she would benefit from a DJJ commitment without properly considering her reformatory or treatment needs. We disagree.

[2] Nor does the record support appellant's argument that the juvenile court failed to determine whether she understood the impact of her no contest plea. The requirements of the hearing are governed by California Rules of Court, rule 5.778. The hearing transcript reflects the court advised appellant of her rights, explained the charges, appellant admitted those charges, her counsel consented to her admission, and the court made the requisite findings.

To determine the proper disposition for a minor, the juvenile court must consider public safety, victim redress, and the minor's best interests. (Welf. & Inst. Code, § 202, subd. (d).) The disposition analysis also includes consideration of the minor's "educational, physical, mental health, and developmental-services needs." (Cal. Rules of Court, rule 5.651(b)(2)(D).) The court also must take into account (1) the minor's age, (2) the circumstances and gravity of the minor's offense, and (3) any prior history of delinquency. (Welf. & Inst. Code, § 725.5.) In addition, the disposition may incorporate punishment, where consistent with the minor's rehabilitation and not imposed for purposes of retribution. (*Id.*, § 202, subds. (b) & (e).) However, before a juvenile ward may be committed to the DJJ, the court must be fully satisfied the mental and physical qualifications of the minor are such as to render it probable he or she will be benefited by the commitment. (*Id.*, § 734.)

Although juvenile law contemplates a progressively more restrictive placement scheme, beginning with home placement under supervision and culminating in commitment to the DJJ, the court may consider commitment without prior recourse to other less restrictive placements. (*In re Nicole H.* (2016) 244 Cal.App.4th 1150, 1159 (*Nicole H.*).) The court's commitment decision will be upheld when the evidence demonstrates a probable benefit to the minor from the commitment and the ineffectiveness or inappropriateness of less restrictive alternatives. (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.) The juvenile court is not required to expressly state on the record its reasons for rejecting less restrictive placements, but the record must contain some evidence that the court appropriately considered and rejected reasonable alternative placements. (*Nicole H.*, at p. 1159.)

We review a juvenile court's commitment decision for abuse of discretion. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) In doing so, we will affirm if there is substantial evidence to support the juvenile court's findings, indulging all reasonable inferences in support of its decision. (*In re Calvin S.* (2016) 5 Cal.App.5th 522, 527–528.)

1. Evidence of Probable Benefit to Appellant from DJJ Commitment

Appellant was 15 years old at the time of the assault. As a result of childhood trauma, appellant suffers from ongoing mental health and behavioral issues, including depression and suicidal thoughts. Her child welfare history indicates that appellant's sister reported appellant could be violent. She has been in psychotherapy and counseling since her early elementary school years. In middle school, appellant began using drugs and alcohol and displayed more "oppositional challenges and episodic outbursts of anger that were difficult to predict or understand." Due to educational and mental health challenges, appellant enrolled in a special education school program pursuant to her individualized education plan (IEP). At the special education school, she participated in 120 minutes of individual therapy a week, 60 minutes of group therapy, and 360 minutes of specialized individual instruction. Despite these services, appellant continued to struggle with depression, anxiety, and anger, reported significant levels of emotional distress, and began experiencing seizures. She was hospitalized for multiple suicide attempts and was diagnosed with major depressive disorder and posttraumatic stress disorder. At the time of the incident, appellant's guardian and a Sonoma County mental health worker were advocating that appellant receive residential treatment services.

The probation officer submitted two reports to the court regarding placement. Those reports identified two main considerations when assessing an appropriate placement for appellant. First, the reports explained public safety was paramount due to the extreme violence of her offense. Second, the reports recognized appellant required intensive therapy to address her ongoing mental health and behavioral issues. In light of these considerations, the reports explained community-based treatment or unlocked treatment facilities would be inappropriate because of the significant public safety risk. This conclusion aligned with Dr. David Schneider's report, which stated, "there is a high likelihood that unless therapists and [appellant] work hard together to prevent it, [appellant] will hurt other people, or do other behaviors that are grounds for arrest and incarceration." The Schneider report concluded, "There is a considerable risk of future violence with [appellant] . . . ."

The probation reports raised various concerns with a locked treatment facility. Namely, such a placement would be out-of-state because there are no locked treatment facilities in California, and "it is possible [appellant] could be discharged from a residential program in as little as six months as discharge planning and step down program options are now being integrated into program admissions and intake processes." The alternative option—a DJJ commitment—provided a "quite small" female population with programming that "utilizes an 'Integrated Behavior Treatment Model,' an evidenced-based practice that includes trauma-focused cognitive behavior therapy for all committed youth." The report also stated the DJJ has a separate mental health unit with an even smaller population for those who need more intensive therapy and supervision, and parents are encouraged to " 'take an active role' " in the treatment and case plans. Ultimately, the probation officer recommended a DJJ commitment over a locked treatment facility because appellant needed "long-term treatment" and it provided greater accessibility to appellant's family than an out-of-state program. The probation officer expressed ongoing concern that alternative placements "would be ineffective or inappropriate given the non-custodial shorter term nature of the therapeutic paradigm," and concluded a DJJ commitment "strikes a balance between rehabilitation and public safety."

The court adopted the probation officer's recommendation, noting "due to the callousness and cruelty of this case" and the "severe mental health issues" that must be addressed, treatment could not be accomplished at either the local level or in a limited placement. It concluded appellant "can receive selective treatment [at DJJ] that could benefit her for her future needs."

Appellant primarily relies on *In re Carlos J.* (2018) 22 Cal.App.5th 1 (*Carlos J.*), to argue this evidence is insufficient to support her DJJ commitment.[3] In *Carlos J.*, the

[3] Appellant also references *Nicole H., supra,* 244 Cal.App.4th 1150. However, in that matter the court noted "nothing in the record supported placing appellant at an institution many hours away from her home." (*Id.* at p. 1155.) As we discuss herein, however, the record contains evidence supporting appellant's commitment to the DJJ.

probation officer recommended commitment to the DJJ based on the underlying offense and his gang association. (*Id.* at p. 7.) "In rejecting a less restrictive placement, the probation officer opined that, 'Programming available at the local level is insufficient to meet the minor's treatment, educational, and social needs.' " (*Id.* at p. 8.) The probation officer further stated the minor " 'must be contained in a state facility where his educational, therapeutic, and emotional issues can be addressed in a secured facility. After serving his term and receiving gang intervention services and other appropriate resources, he will return to the community . . . .' " (*Id.* at pp. 8–9.) The juvenile court committed the minor to the DJJ, concluding " 'the youth will benefit from the reformatory, discipline or other treatment provided by the [DJJ].' " (*Id.* at p. 9.)

The Court of Appeal reversed, noting "there must be *some* specific evidence in the record of the programs at the [DJJ] expected to benefit a minor." (*Carlos J.*, *supra*, 22 Cal.App.5th at p. 10.) The court held, "the law required the juvenile court, not the probation department, to make the finding of probable benefit. The court could not make that finding, and this court cannot review the adequacy of the evidence supporting the finding, without evidence in the record of the programs at the [DJJ] expected to be of benefit to appellant. The probation officer's unexplained and unsupported assertion of possible benefit is not evidence of 'reasonable, credible, and of solid value' from which the juvenile court could make an informed assessment of the likelihood a [DJJ] placement would be of benefit to appellant, in light of his specific needs." (*Ibid.*) In explaining its holding, the court noted the juvenile court "had no information before it regarding any mental health services at the [DJJ]." (*Id.* at p. 11.) Likewise, "the report contain[ed] no information about the nature of the gang intervention services, in order to allow the juvenile court (and this court on review) to make an assessment of the appropriateness and adequacy of the programs for appellant." (*Ibid.*)

In contrast to *Carlos J.*, here the record is not entirely devoid of evidence regarding relevant programs at the DJJ. Specifically, the probation officer's report states the DJJ provides an " 'Integrated Behavior Treatment Model,' " which the report describes as "an evidenced-based practice that includes trauma-focused cognitive

behavior therapy." This description appears to meet the standard set forth in *Carlos J.* for the People's burden of showing the appropriateness of a proposed placement: "some concrete evidence in the record about relevant programs at the [DJJ]" that is identified by the probation department and, "[w]here a minor has particular needs, the probation department should also include *brief* descriptions of the relevant programs to address those needs." (*Carlos J.*, *supra*, 22 Cal.App.5th at p. 12.) In the instant matter, the probation officer's report identified the key program available to address appellant's mental health—the Integrated Behavior Treatment Model—and provided a brief description of that approach. It also noted—albeit without much description—the DJJ had a separate mental health unit, which could provide more intensive therapy and supervision.

While Dr. Schneider expressed concerns about a DJJ placement, his report identified the need for extensive, long-term mental health treatment, acknowledged appellant's past mental health treatment had been insufficient, and identified the serious safety risk posed by appellant in her current state. Dr. Speicher did not specifically address the appropriateness of a DJJ placement, but stated appellant should be "placed in a setting that will provide psychotherapeutic and trauma-based treatment." And the probation reports explained why less restrictive placements would neither provide sufficient long-term treatment nor protect against appellant's current safety risk.

Accordingly, the evidence of programs available to appellant, combined with the need for a long-term mental health treatment plan and a secure facility, provides substantial evidence to support the juvenile court's determination appellant should be committed to the DJJ.[4]

[4] We further note appellant appears to do well in highly structured environments. For example, she has done well in juvenile hall, she "flourished in the small contained safe environment" of her special education school, and she "felt safe and contained while psychiatrically hospitalized" and "felt better with the structure that was provided in that setting."

2. Consideration of Alternative Placements for Appellant

Appellant also contends the juvenile court failed to adequately consider alternative placements. She asserts the first probation report failed to adequately address less restrictive alternatives, and the placements identified in the supplemental report were not properly investigated.

Appellant cites *In re M.S.*, *supra*, 174 Cal.App.4th 1241 (*M.S.*) in support of her position. That case does not compel reversal. In *M.S.*, the probation report concluded, based on past conduct by the minor, he posed a danger to the community "and required long-term treatment in a secured facility." (*Id.* at p. 1248.) One facility was rejected because it was "a short-term placement where the minor could earn furloughs after two months, and it was not likely that family reunification and substance abuse treatment could be achieved in that short a period." (*Ibid.*) Other placements were rejected because they either did not provide the necessary counseling or medical services required by the minor, or they did not "adequately address the need for public safety . . . ." (*Ibid.*) Accordingly, the probation officer recommended the minor be committed to the DJJ, and this recommendation was accepted by the juvenile court. (*Id.* at pp. 1248–1250.) On appeal, this court noted, "this is *not* a case in which the court failed to consider less restrictive alternatives . . . . Indeed, the minor does not even suggest that the court's dispositional order was an abuse of discretion, and such a contention would, in any event, be unavailing." (*Id.* at p. 1250.) However, this court expounded on this point, explaining, "the record demonstrates the court considered every available less restrictive placement, and gave reasons supported by the evidence why [alternative placements] were not appropriate."[5] (*M.S.*, at p. 1251.)

[5] Appellant also relies on *In re Edward C.* (2014) 223 Cal.App.4th 813. In that case, the juvenile court committed the minor to the DJJ despite the probation officer's recommendation the minor be placed on probation with outpatient treatment. (*Id.* at p. 828.) On appeal, the court concluded the juvenile court did not abuse its discretion in doing so because the record indicated the minor had made little progress toward rehabilitation, he performed poorly in local residential treatment programs, he demonstrated ongoing behavioral issues, and the probation officer expressed concerns the

While the record in this matter does not reflect the detail contained in *M.S.*, we do not interpret *M.S.* as requiring such detail. Instead, we must only determine whether there is evidence "supporting a determination that less restrictive alternatives are ineffective or inappropriate." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.) Here, the probation officer submitted an initial report, which provided information regarding alternative placements and set forth concerns with the adequacy of those programs. Specifically, that report stated unlocked placements would be inappropriate due to the violence of the crime, and there were no locked treatment facilities in California. It also noted residential programs often discharge residents within six months to step-down programs, which would not adequately address the safety and therapy needs at issue. At the initial disposition hearing, the court referred the matter back to the probation department for additional information regarding residential placement options. The court stated it "is going to re-refer this back to the probation department for a follow-up in regards to the residential placement part of the report" because it "would like a little more input from probation." The probation officer then submitted a supplemental memorandum, which expounded on residential placement options. That report provided a summary of congregate care facilities within and outside of California. Of the in-state facilities, the report noted only two have the capacity to confine youth, and the minor must volunteer for placement and may ask to be removed at any time unless under conservatorship or other equivalent involuntary placement. This legal limitation on confinement was confirmed by the admissions manager at one of the facilities. The report also identified 18 in-state providers licensed as short-term residential therapeutic programs (STRTP's). With regard to out-of-state facilities, the report noted 13 accept females within appellant's age range. All of those facilities were in the process of becoming licensed as STRTP's with California. The probation officer further noted in

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minor would re-offend. (*Id.* at p. 829.) *Edward C.* merely indicates the juvenile court's commitment decision must be "reasonable under the circumstances." (*Ibid.*) As discussed in this section and part II.B.1., *ante*, we conclude substantial evidence supports the DJJ commitment.

his report that he solicited comments from the "Placement Action Committee" and the "Northern California Placement Committee" regarding possible in-state and out-of-state placement options for appellant.[6] He received responses suggesting one in-state and ten out-of-state programs as possible options. However, none of the recommended programs were of set duration, and all of the programs were in the process of reclassification to STRTP status. The report restated its DJJ commitment recommendation, noting the alternative placements "would be ineffective or inappropriate given the non-custodial shorter term nature of the therapeutic paradigm, relative to a DJJ commitment."

The court concluded, based on the "callousness and cruelty of this case" and the "severe mental health issues," treatment could not be accomplished at either the local level or in limited placement. While the record may lend itself to a legitimate dispute over which facility is the most beneficial or appropriate for appellant, we cannot say the juvenile court abused its discretion when selecting a DJJ commitment.

C. *Appellant's Custody Time*

Appellant claims the court abused its discretion by failing to adequately consider the relevant facts and circumstances when imposing a seven-year maximum custody time. We disagree.

"[Welfare and Institutions Code] Section 731 sets two ceilings on the period of physical confinement to be imposed. The statute permits the juvenile court in its discretion to impose either the equivalent of the 'maximum period of imprisonment that could be imposed upon an adult convicted of the offense or offenses' committed by the juvenile (§ 731, subd. (c)) or some lesser period based on the 'facts and circumstances of the matter or matters that brought or continued' the juvenile under the court's jurisdiction (*ibid*.)." (*In re Julian R.* (2009) 47 Cal.4th 487, 498.) " 'The maximum period of

[6] The Placement Action Committee is a state-wide workgroup of probation officers, Department of Social Services (DSS) personnel, and representatives from University of California, Davis, the Judicial Council and chief probation officers of California. The Northern California Placement Committee is comprised of Northern California-based county probation and child welfare staff, as well as DSS personnel.

confinement set by the court is not a determinate term, it is the ceiling on the amount of time that a minor may be confined in [DJJ], and recognizes that the committing court has an interest in and particularized knowledge of the minors it commits to [DJJ].' " (*In re A.G.* (2011) 193 Cal.App.4th 791, 801.)

At the disposition hearing in this matter, defense counsel argued the juvenile court should "use its discretion in giving the appropriate punishment . . . that [is] warranted by the facts and circumstances of this case . . . ." Defense counsel highlighted the crime was "an aberrant act" as appellant had no prior history of physically violent conduct. Defense counsel further argued appellant was remorseful, took responsibility for her actions, and was amenable to treatment and rehabilitation. Defense counsel concluded by noting appellant "is easily influenced by girls who are stronger personalitied than her" and, in a DJJ commitment, she would be "housed with the worst of the worst."

The record evidences the court considered these, and other, facts and circumstances as related to appellant. The court stated it had read and considered the probation reports, the psychological evaluations, the victim statement, a letter from appellant, and various letters in support of appellant. The court indicated it closely examined the videotape of the incident, and stated it believed appellant engaged in torture based on the violence of the assault, the denigration of the victim, the injuries sustained by the victim, and the perpetrators' decision to circulate the videotape of the attack. The court acknowledged appellant was a minor at the time of the attack and suffered from significant mental health issues. While the record contains some evidence regarding appellant's remorse over the attack, the record also contains opposing evidence. For example, Dr. Schneider's report states appellant's "affect was primarily inappropriate to material discussed and the overall circumstance. She was fairly cheerful and glib through most of the evaluation, though was teary when explicitly asked about the effect of the assault on the victim. . . . [W]ith this adolescent, it is at least in part, a function of a lack of appreciation of the seriousness or implications of the totality of the circumstance[s], for herself or the victim." Dr. Speicher's evaluation also noted: "At one point for a short period, [appellant's] eyes got watery and tearful. Other than that moment, she showed no

signs of distress. Her mood was neutral. Affect expressed was controlled and somewhat muted and notable for focus on her personal experience to the nearly complete exclusion of empathy." Accordingly, the record indicates the court adequately considered the facts and circumstances of this case when setting appellant's maximum custody time, and we cannot conclude the court abused its discretion by committing her to a term of seven years.

D. *Probation Conditions*

Appellant asserts, and the Attorney General concedes, the trial court improperly imposed probation conditions. We agree.

Commitment to the DJJ removed appellant from the direct supervision of the juvenile court. (*In re Antoine D.* (2006) 137 Cal.App.4th 1314, 1324–1325.) In particular, "the juvenile court loses the authority to impose conditions of probation once it commits a ward to" the DJJ. (*In re Edward C., supra*, 223 Cal.App.4th at p. 829; see also *In re Allen N.* (2000) 84 Cal.App.4th 513, 516 ["the imposition of probationary conditions constitutes an impermissible attempt by the juvenile court to be a secondary body governing the minor's rehabilitation"].) The juvenile court lacked authority to impose conditions of probation. Accordingly, those conditions are stricken. (See *Allen N.*, at pp. 514–516 [striking no-contact orders].)

III. DISPOSITION

The challenged probation conditions are stricken. The judgment is otherwise affirmed.

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MARGULIES, ACTING P. J.

WE CONCUR:

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BANKE, J.

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SANCHEZ, J.

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